IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 05-CV-329-GKF(PJC)**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE REFERENCE TO DEFENSE COUNSEL'S ARGUMENT TO THE COURT (Dkt. #2393)

COMES NOW the Plaintiff, the State of Oklahoma, ex rel. W.A. Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, J.D. Strong, in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("State"), and respectfully responds in opposition to Defendants' Motion in Limine to Exclude Reference to Defense Counsel's Argument to the Court (Dkt. #2393) ("Motion in Limine") as follows:

I. Introduction and Background

During Defendants' opening statement at the hearings on the State's Motion for Preliminary Injunction, the following exchange took place between the Court and defense counsel, Patrick Ryan ("Mr. Ryan"):

> THE COURT: But one of [the State's] arguments is that it may not be waste to the extent that the fertilizer can be taken up by the ground and the plants to which it's applied, and that it may under the law be waste to the extent it's overapplied.
>
> MR. RYAN: I understand that argument, yes.
>
> THE COURT: … How would -- if a court were to buy into that argument that it is waste to the extent that it is no longer fertilizer, that it is being disposed of at

> amounts greater than agronomic need, would you not concede that it may well be, under the law, waste?
>
> MR. RYAN: No, Your Honor, for this reason, I mean, there are –
>
> THE COURT: Because, I mean, in a system where the integrators own the chickens but the producers own their excrement and it is of real economic necessity to get rid of that excrement, it is necessarily economically advantageous to apply, perhaps, in amounts greater than agronomic need; correct?
>
> ***
>
> THE COURT: In this proceeding are they not focusing on bacteria as opposed to phosphorus?
>
> MR. RYAN: Yes, Your Honor. No, that's absolutely right, but we're talking about what the land needs and what's being overapplied.
>
> THE COURT: Right, right.
>
> MR. RYAN: I think their argument only goes to the phosphorus, to the one element of phosphorus. It does not address the other twelve elements which I say are needed for plant growth and are beneficial to the crops and plants and pastures and forage. **And I don't think there's any question but that there has been an overapplication of litter on some or many farms. That's <u>not</u> <u>an</u> <u>issue</u> in our book. I'm certainly not arguing that in terms of phosphorus.**

Ex. A (Tr., 2/19/08 at 44:22 – 46:18) (emphasis added). Reviewing this exchange in context, it is clear that Mr. Ryan unambiguously admitted that poultry litter has been over-applied to the land in excess of agronomic need (for phosphorus) on "some or many farms." *Id.*

Despite the clarity of Mr. Ryan's admission of fact and its obvious relevance to all of the State's claims, Defendants seek to exclude the statement through their Motion in Limine. In particular, Defendants attempt to "clarify" Mr. Ryan's statement and argue that it was not an admission at all. In this regard, Defendants point to a portion of defense counsel Robert George's closing statement at the preliminary injunction hearing. Motion in Limine at 2. During that closing, Mr. George claimed that Mr. Ryan's

statement regarding "overapplication" was made in the context of land application occurring under nutrient management plans which are "not based on a strict agronomic rate." Motion in Limine at 2 (quoting Tr. 3/12/08 at 32:23-33:12 (Dkt. #2393-2)). This is a dubious explanation at best, as Mr. Ryan made no mention of nutrient management plans at any point during the pertinent exchange with the Court.[1]

In any event, during Mr. George's purported "clarification" of Mr. Ryan's statement, he himself admitted that "to the extent that applying phosphorus above the agronomic rate of phosphorus is over-application, that has occurred in this watershed." Dkt. #2393-2 (Tr. 3/12/08 at 33:4-6). Thus, even accepting Mr. George's purported clarification, Mr. Ryan's statement must be viewed as a judicial admission by Defendants that there has been overapplication of poultry waste -- beyond agronomic need for phosphorus -- on some or many farms within the IRW. The relevancy and importance of this judicial admission is self-evident. Defendants' Motion in Limine should be denied.

II. Argument

A. Mr. Ryan's Statement Is a Judicial Admission

"Judicial admissions are formal, deliberate declarations which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute." *U.S. Energy Corp. v. Nukem, Inc.*, 400 F.3d 822, 833 n. 4 (10th Cir. 2005). It is well-established that judicial

[1] Further attenuating Mr. George's "explanation" is the fact that nutrient management plans were not an enforceable requirement of Arkansas law until January 1, 2007, well after this lawsuit was filed. Ex. B (R. Young Depo. at 87:23 – 88:16). And the evidence shows that many fields receiving poultry waste in the Illinois River Watershed ("IRW") are saturated with phosphorus, indicating years of overapplication. *See, e.g.*, Dkt. #2182-11 (Fisher Aff. and Attachments A). Moreover, even if growers within the IRW were currently complying with their plans, they are still violating Oklahoma law so long as runoff is occurring. Ex. C (Strong Depo., pp. 211 and 220).

admissions can be made by counsel during an opening statement. *See, e.g., United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986); *United States v. McKeon*, 738 F.2d 26, 30 (2d Cir. 1984); *Berlin v. Celotex Corp.*, 912 F.2d 465 (Table), 1990 WL 125360, at *2 (6th Cir. Aug. 29, 1990); *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880). Such an admission made by a party's counsel during an opening statement is binding against that party. *Id.* Mr. Ryan's statement concerning the overapplication of poultry waste in the IRW is a judicial admission and binding against Defendants.

First, Mr. Ryan's statement was a "formal, deliberate declaration[]," as it was made voluntarily in an opening statement during a formal judicial proceeding. Second, Mr. Ryan's statement was made for the "purpose of dispensing with proof of . . . facts about which there is no real dispute." Again, Mr. Ryan stated as follows:

> And I don't think there's any question but that there has been an overapplication of litter on some or many farms. ***That's not an issue in our book.*** **I'm certainly not arguing that in terms of phosphorus.**

Ex. A (Tr., 2/19/08 at 44:22 – 46:18) (emphasis added). With this statement, Mr. Ryan was clearly saying that overapplication was a fact "about which there is no real dispute." Thus, Mr. Ryan's statement constitutes a judicial admission.

As Defendants correctly note in their Motion, the Tenth Circuit Court of Appeals has recently proclaimed -- in an unpublished decision -- that "'[w]here, however, the party making an ostensible judicial admission explains the error in a subsequent amendment, the trial court must accord the explanation due weight.'" Motion in Limine at 5 (quoting *Smith v. Argent Mortgage Co.*, 2009 WL 1391550, at *5 (10th Cir. May 18, 2009). Relying on Mr. George's closing statement, Defendants claim that they have "clarified the intended meaning" behind Mr. Ryan's statement. *Id.* As noted above,

however, Mr. George's purported "clarification" that Mr. Ryan's statement was made in the context of growers complying with nutrient management plans is dubious. Indeed, Mr. George's "nutrient management plan" clarification bears no resemblance to what Mr. Ryan actually said. As such, giving Mr. George's clarification "due weight," it should not be credited at all. Therefore, the State should be permitted to present Mr. Ryan's statement to the fact-finder as a binding judicial admission, and Defendants should be barred from arguing that there has not been an overapplication of poultry waste on some or many farms within the IRW. This judicial admission should be accepted free of Mr. George's strained "nutrient management plan" explanation.

However, even if the Court were to accept Mr. George's purported clarification at face value, Mr. Ryan's statement would still constitute a judicial admission that there has been overapplication of poultry waste -- beyond agronomic need for phosphorus -- on some or many farms within the IRW. In fact, Mr. George himself acknowledges that this is true. Dkt. #2393-2 (Tr. 3/12/08 at 33:4-6). Even crediting Mr. George's highly questionable explanation, Mr. Ryan's statement remains a judicial admission. There simply is no remaining controversy as to whether poultry waste has been land-applied in excess of agronomic need.

Defendants argue that Mr. Ryan's statement is irrelevant because it is "not evidence." Nonetheless, because Mr. Ryan's statement qualifies as a judicial admission, Defendants' argument in this regard is truly unimportant. Again, as a judicial admission, like a stipulation, Mr. Ryan's statement is binding against Defendants. *Blood*, 806 F.2d at 1221; *McKeon*, 738 F.2d at 30; *Berlin*, 1990 WL 125360, at *2; *Oscanyan*, 103 U.S. at 263. A judicial admission has the "effect of withdrawing a fact from contention."

Martinez v. Bally's Louisiana, Inc., 244 F.3d 474, 476 (5th Cir. 2001) (citation omitted). Such a judicial admission is "conclusive unless the court allows it to be withdrawn." *Id.* at 477. A judicial admission is actually superior to an "ordinary evidentiary admission" because, unlike judicial admissions, ordinary evidentiary admissions may be "controverted" by a party. *Id.*

Mr. Ryan's statement is also clearly relevant in substance. Indeed, Mr. Ryan's statement is relevant to all of the State's claims. The evidence in this case demonstrates rampant and widespread over-application of poultry waste in the IRW, which increases the occurrences and likelihood of runoff. The scientific evidence in this case shows that at a soil test phosphorus ("STP") level of 65 lbs/acre or higher, there is virtually no agronomic benefit gained from applying additional phosphorus. *See* Dkt. #2088-7 (Zhang Depo., p. 189); #2088-9 (Johnson Rpt., ¶ 5). The evidence additionally shows that land application of poultry waste on fields with an STP of 120 lbs/acre constitutes disposal of poultry waste without benefit to crop production and with an increased risk to water quality by runoff and erosion. *See* Dkt. #2088-10 (OSU, PT 98-1, p. 5). The available soil test evidence is that the overwhelming majority of fields linked to Defendants are in excess of these STP thresholds. Dkt. #2182-11 (Fisher Aff. and Attachment A). Indeed, soil tests from Tyson's own Research Farm in Springdale have reflected STP levels as high as 726 lbs/acre. *Id.* ¶ 12. Additionally, evidence of overapplication is important because the surface water and groundwater of the IRW are highly susceptible to phosphorus and bacteria pollution from land-applied poultry waste because of the terrain and geology of this area, the manner of land application, and the nature of poultry waste. *See* Dkt. #2088-6 (5/14/09 Fisher Aff., ¶¶ 7-27).

In sum, Mr. Ryan's statement is relevant and should be deemed a binding judicial admission; the Court should bar Defendants from arguing at trial that there has not been an overapplication of poultry waste on some or many farms within the IRW.

B. In the Alternative, Even If the Court Determines That Mr. Ryan's Statement Is Not a "Judicial Admission," the Statement Is Admissible as an Evidentiary Admission

Even if the Court should determine that Mr. Ryan's statement is not a judicial admission, the statement would still qualify as an evidentiary admission under Fed. R. Evid. 801(d)(2). "'A distinction is generally recognized between an attorney's judicial admissions, which, like any stipulation, can bind a party within a given lawsuit, and an attorney's less formal evidentiary admissions, which are statements made as a party's agent and which the trier of fact may evaluate as it sees fit.'" *Blood,* 806 F.3d at 1221, n.2 (quoting *McKeon,* 738 F.2d at 30 n.3).

The hearsay section of the Federal Rules of Evidence governs evidentiary admissions. A statement is not hearsay under Rule 801(d)(2)(D) if it is made by the opposing party's "***agent or servant*** concerning a matter ***within the scope of the agency or employment***, made ***during the existence of the relationship***" (emphasis added). Mr. Ryan's statement qualifies as such an admission by a party-opponent because: (1) Mr. Ryan is an agent of Defendants; (2) the statement concerned a matter within the scope of his agency (*i.e.*, the land application of poultry waste from Defendants' birds); and (3) the statement was made during the existence of the agency relationship. And, because Mr. Ryan's statement would qualify as an admission by a party-opponent, it is admissible even if Mr. Ryan lacked personal knowledge or expertise as to the matter asserted. *See, e.g., Grace United Methodist Church v. City of Cheyenne,* 451 F.3d 646, 667 (10th Cir.

2006); *Smedra v. Stanek*, 187 F.2d 892, 894 (10th Cir. 1951). Therefore, even if the Court concludes that the statement does not meet the judicial admission test, the State should still be permitted to introduce Mr. Ryan's statement as an evidentiary admission.

C. Mr. Ryan's Statement Should Not Be Excluded Under Rule 403

Defendants' last argument is that "[e]ven if Mr. Ryan's statement were somehow relevant evidence, it should nevertheless be excluded because its marginal (if any) probative value is substantially outweighed by the danger it presents of unfair prejudice, confusion and delay." Motion in Limine at 5-6 (citing Fed. R. Evid. 403). This argument is without merit.

First, Mr. Ryan's statement was clear and unequivocal (*i.e.*, "That's not an issue in our book."). There is nothing confusing about it. The only possible confusion is manufactured by Mr. George's attempt to "clarify" the statement. However, even there, Mr. George concedes that there has been overapplication of phosphorus in the IRW.

Second, Defendants have mounted no discernible argument that Mr. Ryan's statement is irrelevant in substance. Quite the contrary, as shown *supra*, the issue of whether there has been overapplication of poultry waste is highly relevant in this case. As such, the statement's probative value is not substantially outweighed by the imagined "dangers" of prejudice, confusion and delay put forth by Defendants. The very concept of a party arguing that its own lawyer's clear admission of fact should be excluded as unduly prejudicial is incredible. Mr. Ryan's statement passes scrutiny under Rule 403. The Motion in Limine should be denied.

Respectfully submitted,

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